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A

Asriyah bt Sairy v Suruhanjaya Perkhidmatan Awam, Malaysia & Anor

B HIGH COURT (KUALA LUMPUR) — GUAMAN SIVIL NO S1–22–41 OF 1988
KANG HWEE GEE J
18 FEBRUARY 2009

C

Administrative Law — Rights and liabilities of public servants — Termination — Whether afforded right to oral hearing — Whether disciplinary authority taken into account critical element of public servant's representation — Whether breach of natural justice — Public Officers (Conduct and Discipline) (Chapter D *D) General Orders 1980 general order 26*

Administrative Law — Rules of natural justice — Dismissal — Whether right to be heard included right to oral hearing — Whether failure to give oral hearing E *may be challenged — Whether failure of justice occasioned*

Constitutional Law — Public servants — Dismissal — Staff nurse — Right to be heard — Whether oral hearing held — Whether breach of constitutional right F *to be heard under art 135(2) of the Federal Constitution*

Labour Law — Employment — Dismissal — Staff nurse dismissed for failing to attend work — Written representation made to disciplinary committee — Whether oral hearing held — Whether employee's representation taken into G *account — Whether breach of natural justice — Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 general order 26*

H The plaintiff was a staff nurse, serving at the Kota Tinggi District Hospital after being transferred from Bentong District Hospital. She failed to attend work and disciplinary proceedings was initiated against her by the first defendant. The charge was communicated to her by a letter wherein she was asked to submit a written representation explaining why disciplinary action I should not be taken against her. The plaintiff requested for an oral hearing but was refused. The plaintiff then submitted her representation by a letter. The first defendant decided to dismiss her and she was notified of the decision. In this suit the plaintiff applied for judicial review of the decision of the first defendant in dismissing her based on the submission that she had

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been denied the right to an oral hearing despite the fact that she had requested for one. The plaintiff gave evidence that she had married a Hindu and as a result, she was abducted by her brother, and detained in Kota Tinggi and was forced to abort her child. She was forced to work in Hospital Kota Tinggi after she was abducted and she feared for her and her husband's life if she were to remain in Kota Tinggi. This explanation which was consistent with what she had submitted in her letter of representation to the disciplinary authority was not disagreed with or rebutted by the defendants.

Held, allowing the plaintiff's application:

(1) A civil servant facing a disciplinary proceeding before the disciplinary authority is not entitled to an oral hearing. However, there can exist peculiar situations in the representation submitted to the disciplinary authority by a civil servant pursuant to general order 26 of the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 ('GO') that can only be properly appreciated and considered by an oral hearing and a failure to afford him that opportunity may result in the representation being inadequately or improperly assessed (see paras 10–11); *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114; *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417 dan *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308 referred.

(2) General order 26(5), (6) and (8) of the GO confer onto the civil servant a legitimate right that the disciplinary authority considers whether his case requires further clarification and if so be referred to a committee of inquiry where he may have the opportunity to give oral evidence (see para 15).

(3) The repression claimed by the plaintiff was highly relevant to the charge. It provided the reasons for her failure to turn up for work and if accepted by the disciplinary authority may have provided a cause to exculpate her fully of the charge or at least partially which may have led the authority to consider a lesser punishment other than dismissal. It was certainly an appropriate case for the disciplinary authority to seek further clarification through a committee of inquiry in order that the representation of the plaintiff could be properly appraised to be able to properly decide on her fate (see para 17).

(4) It is incumbent on a disciplinary committee to indicate clearly to the court undertaking a judicial review that it has decided that no clarification on the representation was required and that it had

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proceeded to consider the case nevertheless without the need of such clarification. The plaintiff's predicament did not appear to have been addressed and considered by the disciplinary authority when it deliberated on the plaintiff's representation. As such, the disciplinary authority had offended one of the three accepted 'Wednesbury tests' in failing to take into account a critical factor that ought to have been taken into account and in the process denied the plaintiff of her proper right to be heard thereby rendering its decision to dismiss her invalid (see paras 18 & 20).

(5) A procedural impropriety had been committed by the disciplinary authority not by the denial of an oral hearing to the plaintiff, but by failing to take into account a critical element of the plaintiff's representation which it ought to have taken into account; and by its failure to observe procedural fairness of process; and in the event denied the plaintiff of her proper constitutional right to be heard under art 135(2) of the Federal Constitution (see para 22).

[Bahasa Malaysia summary

Plaintif merupakan seorang jururawat am, yang berkhidmat di Hospital Daerah Kota Tinggi selepas dipindahkan dari Hospital Daerah Bentong. Dia gagal untuk hadir bekerja dan prosiding tatatertib telah dimulakan terhadapnya oleh defendan pertama. Pertuduhan telah disampaikan kepadanya melalui surat yang mana dia diminta mengemukakan representasi bertulis menjelaskan kenapa tindakan tatatertib tidak patut diambil terhadapnya. Plaintif telah memohon perbicaraan secara lisan tetapi ditolak. Plaintif kemudian telah mengemukakan representasinya melalui surat. Defendan pertama memutuskan untuk memecatnya dan dia dimaklumkan tentang keputusan tersebut. Dalam guaman ini plaintif memohon semakan kehakiman terhadap keputusan defendan pertama yang memecatnya berdasarkan penghujahan bahawa dia dinafikan hak terhadap perbicaraan secara lisan meskipun pada hakikatnya dia telah membuat permohonan untuknya. Plaintif telah memberikan keterangan bahawa dia telah berkahwin dengan seorang Hindu dan akibatnya, dia diculik oleh abangnya, dan dilarikan ke Kota Tinggi dan dipaksa menggugurkan anaknya. Dia dipaksa bekerja di Hospital Kota Tinggi selepas dilarikan dan berasa takut tentang keselamatan diri dan suaminya jika dia masih kekal di Kota Tinggi. Penjelasan ini yang konsisten dengan apa yang telah dikemukakan dalam surat representasinya kepada pihak berkuasa tidak pula dibantah atau tidak dipersetujui oleh defendan-defendan.

Diputuskan, membenarkan permohonan plaintif:

(1) Kakitangan kerajaan yang berdepan dengan prosiding tatatertib

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di hadapan pihak berkuasa tatatertib tidak berhak untuk perbicaraan secara lisan. Walau bagaimanapun, terdapat situasi tertentu dalam representasi yang dikemukakan kepada pihak berkuasa tatatertib oleh kakitangan kerajaan menurut peraturan am 26 Peraturan-Peraturan Am (Kelakuan dan Tatatertib) Pegawai-Pegawai Kerajaan (Bab 'D') 1980 ('PA') yang boleh difahami dan dipertimbangkan dengan sewajarnya melalui perbicaraan secara lisan dan kegagalan untuk memberikannya peluang itu mungkin mengakibatkan representasi itu tidak dapat dinilai dengan secukupnya atau sewajarnya (lihat perenggan 10–11); *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114; *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417 dan *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308 dirujuk.

(2) Peraturan am 26(5), (6) dan (8) PA memberikan kakitangan kerajaan hak yang sah yang mana pihak berkuasa disiplin akan pertimbangkan sama ada kesnya memerlukan penjelasan selanjutnya dan jika begitu akan dirujuk kepada jawatankuasa siasatan di mana dia mempunyai peluang untuk memberikan keterangan secara lisan (lihat perenggan 15).

(3) Penindasan yang didakwa oleh plaintif adalah amat relevan dengan pertuduhan. Ia memberikan sebab-sebab kegagalannya untuk hadir bekerja dan jika diterima oleh pihak berkuasa tatatertib boleh memberikan sebab untuk membebaskannya daripada pertuduhan sepenuhnya atau sekurang-kurangnya sebahagian daripadanya yang boleh menyebabkan pihak berkuasa mempertimbangkan hukuman yang lebih ringan selain daripada pemecatan. Sememangnya ia kes yang sesuai untuk pihak berkuasa meminta penjelasan selanjutnya melalui jawatankuasa siasatan bagi tujuan representasi plaintif dinilai dengan sewajarnya agar nasibnya dapat diputuskan sewajarnya (lihat perenggan 17).

(4) Jawatankuasa siasatan wajib menunjukkan dengan jelas kepada mahkamah yang mengendalikan semakan kehakiman bahawa ia telah memutuskan bahawa tiada penjelasan ke atas representasi diperlukan dan bahawa ia telah terus mempertimbangkan kes itu meskipun tanpa keperluan penjelasan sedemikian. Kesusahan plaintif tidak diutarakan dan diambilkira oleh pihak berkuasa tatatertib apabila ia mempertimbangkan representasi plaintif. Oleh itu, pihak berkuasa tatatertib telah melanggar salah satu daripada tiga '*Wednesbury tests*' kerana gagal untuk mengambilkira faktor kritikal yang sepatutnya diambilkira dan dalam proses menafikan plaintif hak sewajarnya untuk

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A didengar oleh demikian telah menjadikan keputusannya untuk memecat plaintif sebagai tidak sah (lihat perenggan 18 & 20).

(5) Prosedur yang salah telah dilakukan oleh pihak berkuasa tatatertib bukan kerana penafian perbicaraan secara lisan terhadap plaintif, tetapi kerana kegagalan mengambilkira elemen kritikal representasi plaintif yang sepatutnya telah diambilkira; dan oleh kerana kegagalannya untuk meneliti proses prosedur keadilan; sehingga akhirnya telah menafikan plaintif hak perlembagaan sewajarnya untuk didengar di bawah perkara 135(2) Perlembagaan Persekutuan (lihat perenggan 22).]

Notes

For cases on dismissal under administrative law, see 1 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 804–808.

For cases on dismissal under constitutional law, see 3(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2281–2290.

For cases on dismissal under labour law, see 8 *Mallal's Digest* (4th Ed, 2006 Reissue) paras 920–953.

For cases on termination, see 1 *Mallal's Digest* (4th Ed, 2008 Reissue) paras 772–783.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, CA (folld)

Ganasan a/l Marimuthu v Public Services Commission & Anor [1998] 4 MLJ 280; [1998] 4 CLJ 331, CA (refd)

Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114, SC (refd)

Laker Airways Ltd v Department of Trade [1977] 1 QB 643, CA (refd)

Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal [2001] 2 MLJ 417, FC (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (refd)

Mamat bin Talib (Timbalan Ketua Polis, Johor) & Anor v Abdul Jalil bin Rashid [2006] 2 MLJ 108; [2005] 4 CLJ 892, CA (refd)

Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors [1995] 1 MLJ 308, CA (refd)

Legislation referred to

Federal Constitution art 135(2)

Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 general orders 26, 26(5), (6), (8)

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Ramkarpal Singh (Karpal Singh & Co) for the plaintiff.
Narkunavathy Sundareson (Senior Federal Counsel, Attoney General's Chambers) for the defendants.

Kang Hwee Gee J:

[1] The plaintiff was a staff nurse, serving at the Kota Tinggi District Hospital after being transferred from Bentong District Hospital.

[2] She failed to attend work as a staff nurse at her new posting at Kota Tinggi District Hospital in consequence of which disciplinary proceeding was initiated against her by the first defendant Suruhanjaya Perkhidmatan Awam Malaysia on the following charge:

> Bahawa kamu, Asriyah bte Sairy yang bertugas sebagai Jururawat Terlatih, di Hospital Daerah Kota Tinggi, Johor telah tidak hadir bertugas tanpa cuti atau apa-apa sebab yang munasabah mulai 1.9.80 hingga sekarang. Dengan meninggalkan jawatan kamu itu tanpa cuti atau apa-apa sebab, kamu telah melakukan kesalahan di bawah Perintah Am 21(1), Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab D) 1980 yang membolehkan tindakan tatatertib dengan tujuan buang kerja diambil terhadap kamu di bawah Perintah Am 26, Perintah-Perintah Am yang tersebut itu. Perbuatan kamu itu juga adalah satu kelakuan yang tidak bertanggungjawab bertentangan dengan Perintah Am 4(2)(g) Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab D) 1980. (14 ABD 1)

[3] The charge was communicated to her by a letter and in this letter the plaintiff was informed that she had to submit a written representation within 20 days of the receipt of the letter explaining why disciplinary action should not be taken against her.

[4] More than a month later, the plaintiff through her solicitors wrote to the first defendant requesting an oral hearing but this was refused. The plaintiff was given a further 20 days to submit her written representation pursuant to general order 26 of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980..

[5] The plaintiff then submitted her representation to her solicitors by a letter dated 2 April 1982 as follows:

> KR/CV/1226/81A/LST
>
> SPA. 91834/3/(4)
>
> 2nd April, 82

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Setiausaha,

Suruhanjaya Perkhidmatan Awam,

(Bahagian Tatatertib (Naik Pangkat)),

Tingkat 11, Wisma Keramat,

Jalan Gurney,

Kuala Lumpur.

Tuan,

Per: Asriyah Bte Sairy: Kenyataan alasan-alasan Membuang Kerja.

Kami bertindak bagi pihak Puan Asriyah Bte Sairy pelanggan kami.

Puan Asriyah bte Sairy telah pun menerima kenyataan alasan-alasan membuang kerja sebagai Jururawat terlatih di Hospital Daerah, Kota Tinggi, Johor.

Puan Asriyah ingin menjawab kepada tuduhan-tuduhan terhadapnya seperti berikut: —

(1) Beliau tiada hadzir bertugas tanpa cuti mulai dari 1hb. September, 1980 hingga sekarang dengan sebab hal-hal luarbiasa yang berhubung dengan keselamatannya dan diri sendiri

(i) Beliau telah dilarikan dari pangkuan suaminya di Bentong, Pahang oleh Azahari Bin Sairy dan Mohd Khalid Bin Sairy pada 19hb. April, 1979 dan dibawa ke Kota Tinggi Johor, atas alasan orang-orang tersebut adalah saudara-maranya dan mereka tidak setuju dengan perkahwinan Puan Asriyah dengan G. Nadarajah dari Bentong, Pahang.

(ii) Puan Asriyah hamil ketika masa itu dan beliau di paksa menggugurkan anak yang masih dalam rahimnya.

(iii) Tanpa kebenaran ataupun pengetahuan beliau, beliau ditukar ke Hospital Daerah, Kota Tinggi Johor, dari Hospital Daerah, Bentong. Encik Zulkifly Yahaya Setiausaha di Kementerian Kesihatan Malaysia, dan Y.B. Yusof Jani Wakil Parlimen bagi kawasan Panti bersubahat dalam hal ini dengan Azahari Bin Sairy dan Mohd Kamal Bin Sairy bagi tujuan Penukaran tempat kerja.

(iv) Dalam masa beliau dipaksa berkhidmat di Hospital Daerah Kota Tinggi beliau dikawal dengan rapi oleh orang-orang tertentu termasuk Azahari Bin Sairy dan rakan-rakannya dan beliau terpaksa hidup sebagai orang tahanan.

(v) Beliau dapat satu peluang untuk lepaskan dirinya dari tahanan pada 31hb. Ogos,1980 dan hijrah ke keselamatan dan pangkuan suaminya.

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(vi) Beliau telah sebutkan hal-hal ini dalam permintaan untuk tukar tempat kerjanya ke Triang, Pahang, tempat kediaman suami beliau, tetapi Kementerian Kesihatan enggan membuat demikian.

(vii) Beliau juga hendak meneruskan perkhidmatannya sebagai jururawat tetapi jikalau beliau kembali ke Kota Tinggi beliau takut beliau akan hilang nyawanya.

Puan Asriyah meminta pihak tuan timbang perkara ini dan tukar tempat kerja beliau ke Triang atas dasar perikemanusiaan.

Kami yang harap,

t.t.

Karpal Singh

[6] The first defendant met on 6 June 1983. It decided to dismiss her with effect from 1 September 1980 and she was notified of the first defendant's decision by a letter dated 17 June 1983.

[7] In this suit the plaintiff seeks:

(1) a declaration that the first defendant had denied the plaintiff a reasonable opportunity of being heard and had acted upon materials withheld from the plaintiff thereby infringing the established principle of natural justice and rendering the purported dismissal of the plaintiff on the 6 of June 1983 null and void and of no effect;

(2) a declaration that the first defendant did not have adequate basis to dismiss the plaintiff;

(3) a declaration the plaintiff is still an employee of the second defendant and entitled to all salaries and benefits due to the plaintiff;

(4) an inquiry to determine the salaries, emoluments and other benefits due to the plaintiff; and

(5) damages for wrongful dismissal.

[8] The plaintiff's claim is essentially an application for judicial review of the decision of the first defendant in dismissing her and is based on the submission that she had been denied the right to an oral hearing despite the fact that she had requested for one. Her counsel, Mr Ramkarpal Singh, relied on the following passage of Gopal Sri Ram JCA in *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308 at p 316:

The proposition that the right to be heard does not *in all cases* include the duty to afford an oral hearing is well settled by binding precedent (see *Najar Singh v Government of Malaysia & Anor* [1976] 1 MLJ 203; *Ghazi bin Mohd Sawi v Mohd*

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Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor [1994] 2 MLJ 114). That there can be no breach of a duty where none exists is axiomatic.

Nevertheless, the principle that the right to be heard is non-inclusive of a duty to afford an oral hearing does not mean that the failure or refusal to afford such a hearing would render the decision reached safe and harmless from attack. Cases may arise where, *in the light of peculiar facts*, the failure to afford an oral hearing may result in the decision arrived at being declared a nullity or quashed (see *R v Immigration Appeal Tribunal, ex p Mehmet* [1977] 2 All ER 602; [1977] 1 WLR 795).

The categories of procedural fairness are not closed and the procedure adopted in a particular case may be fair or otherwise *according to its own facts*. The measure of fairness afforded to a particular plaintiff is a question of fact and of degree that is to be judged according to our own standards and values and not according to the standards and values of a foreign judge, however eminent. That is not to say that we cannot obtain valuable assistance from other sources; but in the final analysis, it is a question that is to be decided according to the Malaysian concept of fairness. (Emphasis added.)

[9] The plaintiff's claim is opposed essentially on the ground that the disciplinary proceeding was regularly conducted under the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 and that under the procedure provided therein the plaintiff did not have a right to an oral hearing. No procedural impropriety was committed by the disciplinary authority as it had sat and considered the plaintiff's representation and decided that the plaintiff had failed to exculpate herself of the charge.

[10] The law that a civil servant facing a disciplinary proceeding before the Disciplinary Authority is not entitled to an oral hearing is well established by high judicial precedents notably of the Supreme Court in *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114 and followed more recently, by the Federal Court in *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v Utra Badi a/l K Perumal* [2001] 2 MLJ 417.

[11] But the decision of Gopal Sri Ram JCA in *Raja Abdul Malek Muzaffar*, is clear, was not intended to oppose the entrenched principle, but to address a finer point of natural justice that there can exist peculiar situations in the representation submitted to the disciplinary authority by a civil servant pursuant to general order 26 that can only be properly appreciated and considered by an oral hearing — and that a failure to afford him that opportunity may result in the representation being inadequately or improperly assessed that it cannot be well said that he has been afforded a fair hearing.

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[12] It is well established that a disciplinary proceeding against a civil servant pursuant to art 135(2) of the Federal Constitution, may only be conducted (in the instant case) under general order 26 of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 enacted for the purpose.

[13] In a disciplinary proceeding initiated under general order 26, such an opportunity to be heard orally can only arise under general order 26(5) at the 'committee of inquiry' stage. General order 26(5) states that:

> Where the Appropriate Disciplinary Authority considers that the case against the officer requires further clarification, it may appoint a Committee of Inquiry consisting of not less than two senior Government officers who shall be selected with due regard to the standing of the officer concerned and to the nature and gravity of the complaints which are the subject of the inquiry, provided that an officer lower in rank than the officer who is the subject of the inquiry or the officer's Head of Department shall not be selected to be a member of the Committee.

[14] As NH Chan JCA observed in *Ganasan a/l Marimuthu v Public Services Commission & Anor* [1998] 4 MLJ 280; [1998] 4 CLJ 331:

> It is only if a committee of inquiry is appointed because the disciplinary authority requires further clarification in the case against the officer (general order 26(5)), that he will have the opportunity of giving oral testimony to exculpate himself (general order 26(6)). It is only then that the committee has discretion to allow him to be represented by an officer of the public service or, in exceptional cases, by an advocate and solicitor (general order 26(8)).

[15] The effect of general order 26(5), (6) and (8) is to confer on to the civil servant a legitimate right that the disciplinary authority considers whether his case requires further clarification and if so be referred to a committee of inquiry where he may have the opportunity to give oral evidence. As Lord Denning MR said in *Laker Airways Ltd v Department of Trade* [1977] 1 QB 643 at p 708 A (as approved by the Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65:

> If it is found that the power has been exercised improperly or mistakenly so as to impinge unjustly on the legitimate rights or interests of the subject then these courts must so declare. They stand as ever between the executive and the subject, 'alert to see that any coercive action is justified in law': see *Liversidge v Anderson* [1942] AC 206 at p 244.

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[16] The plaintiff gave evidence at the trial giving the reason for her absence from duty at the Kota Tinggi District Hospital which the defendants did not deem necessary to disagree or rebut. The explanation is consistent with what she submitted in her letter of representation to the disciplinary authority dated 2 April 1982. Her explanation is as follows:

(a) she was subjected to serious pressure by her family as she had married SP2 who was a Hindu and, as such, their marriage was not recognised;

(b) as a result, she was abducted by her brother, one Azahari bin Sairy and others on 19 April 1979 and detained in Kota Tinggi;

(c) the reason she was abducted was because her said brother wanted her to separate from SP2 as she had renounced Islam and had married him in accordance with Hindu rites;

(d) at the time of her abduction, she was pregnant and her brother had forced her to abort her child;

(e) she was also accused of committing '*khalwat*' with her own husband, SP2, and imprisoned for a period of two months as a result;

(f) she was forced to work in Hospital Kota Tinggi after she was abducted until September 1979; and

(g) she feared for her and her husband's life if she were to remain in Kota Tinggi for the above reasons.

[17] Needless to say the repression she complained of was highly relevant to the charge. It provided the reasons for her failure to turn up for work and if accepted by the disciplinary authority may provide a cause to exculpate her fully of the charge or at least partially which may lead the authority to consider a lesser punishment other than dismissal. It was certainly an appropriate case for the disciplinary authority to seek further clarification through a committee of inquiry in order that the representation of the plaintiff could be properly appraised to be able to properly decide on her fate.

[18] A judicial review is of course concerned with an inquiry on process and not merit. An exercise of discretion by the disciplinary authority whether or not to appoint a committee of inquiry under general order 26(5) would not therefore normally be subjected to judicial oversight. But if such a committee had not been appointed it would be incumbent on the disciplinary committee to indicate clearly to the court undertaking a judicial review that it has decided that no clarification on the representation was required and that it had proceeded to consider the case nevertheless without the need of such clarification.

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[19] Now the evidence of the witness for the defendants Tan Awang Besar (DW2) was also only able to say from the record of the disciplinary process undertaken by the disciplinary authority, that the first defendant considered the plaintiff's representation during a meeting held on 6 June 1983 and decided to dismiss the plaintiff with effect from 1 September 1980. It would appear that no inquiry was ever made on the probable involvement in her predicament by the Setiausaha di Kementerian Kesihatan Malaysia Encik Zulkifly Yahaya, the member of Parliament for Panti YB Yusof Jani, and two other persons Azahari bin Sairy and Mohd Kamal bin Sairy. In fact Encik Tan Awang Besar was able to say with certainty that in considering the plaintiff's representation the first defendant relied only on the following four documents:

(a) the first defendant's show cause letter;

(b) the plaintiff's solicitor's letter requesting for an oral hearing;

(c) the first defendant's reply to that letter; and

(d) the plaintiff's representation letter through her solicitor.

[20] Given that no committee of inquiry was appointed, and that this crucial point did not appear to have been addressed and considered by the disciplinary authority when it deliberated on the plaintiff's representation on 6 June 1983, I am constrained to find that the disciplinary authority had offended one of the three accepted 'Wednesbury tests' in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, in failing to take into account a critical factor that ought to have been taken into account and in the process denied the plaintiff of her proper right to be heard thereby rendering its decision to dismiss her invalid. Above all, a disciplinary authority conducting a disciplinary hearing on a civil servant would also have to ensure that the process is free of 'procedural unfairness'. This requirement is stated succinctly in *Mamat bin Talib (Timbalan Ketua Polis, Johor) & Anor v Abdul Jalil bin Rashid* [2006] 2 MLJ 108; [2005] 4 CLJ 892, (a decision on a disciplinary hearing conducted under an orderly room procedure) per Gopal Sri Ram JCA in his opening speech:

> We begin with what we consider to be the following well-established propositions:
>
> (i) A decision by a public law decision-maker may be struck down by the courts on grounds of procedural unfairness or 'Wednesbury unreasonableness' (see *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147).
>
> (ii) The content of procedural fairness is not fixed. It is a flexible concept and whether there has been procedural fairness in a given case depends on the facts and circumstances of that case. See *The Board of*

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Education of the Indian Head School v Knight [1990] 1 SCR 65; *Haji Ali bin Haji Othman v Telekom Malaysia Berhad* [2003] 3 MLJ 29; [2003] 3 CLJ 310.

(iii) The essential requirements of an acceptable procedure is that it be fair and impartial. See *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] 2 MLJ 169; [1962] 1 LNS 14. Fairness includes, but is not confined to, the right to be heard which in some cases may be satisfied by the grant of a right to make written representations (*Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 MLJ 114; [1994] 2 CLJ 333) whilst in others it can only be satisfied by an oral hearing. See *M Sentivelu a/l R Marimuthu v Public Services Commission Malaysia & Anor* [2005] 5 MLJ 393; [2005] 3 CLJ 778.

(iv) The test to determine whether the particular procedure adopted in a given case was fair is subjective. The court must place itself in the shoes of the decision-maker and decide whether the procedure adopted provided adequate fairness to the person concerned. See *Kioa v West* (1985) 159 CLR 550 where Brennan J said:

> What the principles of natural justice require in particular circumstances depends on the circumstances known to the repository at the time of the exercise of the power or the further circumstances which, had he acted reasonably and fairly, he would then have known. The repository of a power has to adopt a reasonable and fair procedure before he exercises the power and his observance of the principles of natural justice must not be measured against facts which he did not know and which he would not have known at the relevant time though he acted reasonably and fairly. As the obligation to observe the principles of natural justice is not correlative to a common law right but is a condition governing the exercise of a statutory power, the repository satisfies the condition by adopting a procedure which conforms to the procedure which a reasonable and fair repository of the power would adopt in the circumstances when the power is exercised. When the question for the court is whether the condition is satisfied, *the court must place itself in the shoes of the repository of the power to determine whether the procedure adopted was reasonable and fair*. (Emphasis added.)

[21] Having known of the matters in the plaintiff's written representation, a failure on the part of the disciplinary authority to appoint a committee of inquiry to seek clarification and to proceed to consider the representation without inquiring into the allegation in the representation constitutes a procedural unfairness of process.

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[22] For the foregoing reasons I am constrained to find that a procedural impropriety had been committed by the disciplinary authority not by the denial of an oral hearing to the plaintiff, but by failing to take into account a critical element of the plaintiff's representation which it ought to have taken into account; and by its failure to observe procedural fairness of process; and in the event denied the plaintiff of her proper constitutional right to be heard under art 135(2) of the Federal Constitution.

[23] There shall accordingly be an order that the decision of the disciplinary authority dismissing the plaintiff be declared null and void and that the plaintiff be returned to status quo ante as an employee of the second defendant and be entitled to all such salaries and benefits as if she had not been dismissed. The plaintiff shall be entitled to costs of this suit.

Application allowed with costs.

Reported by Kanesh Sundrum